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FEDERAL ELECTION COMMISSION

BEFORE THE FEDERAL ELECTION COMMISSION

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In the Matter of

)

MUR 7053

Flemming for Congress and Martha Flemming
in her official capacity as treasurer

)

CELA

)

Spanky, LLC

)

Sherry Hackett

)

SECOND GENERAL COUNSEL'S REPORT

I. ACTIONS RECOMMENDED

We recommend that the Commission: (1) find reason to believe that Sherry Hackett violated 52 U.S.C. § 30116(a) by making excessive contributions to Flemming for Congress and Martha Flemming in her official capacity as treasurer (the "Committee"); (2) approve the attached Factual & Legal Analysis; (3) enter into pre-probable cause conciliation with Sherry Hackett and the Committee; (4) approve the attached conciliation agreements; and (5) approve the appropriate letters.

II. BACKGROUND

On April 26, 2016, the Commission found reason to believe that Flemming for Congress and Martha Flemming in her official capacity as treasurer (the "Committee") violated 52 U.S.C. § 30116(f) and 11 C.F.R. § 110.9 by knowingly accepting a \$146,400 excessive contribution in the form of two loans from Spanky, LLC.¹ It also found reason to believe Spanky, LLC, violated 52 U.S.C. § 30116(a) and 11 C.F.R. § 110.1(b) by making the excessive

¹ See Certification, MUR 7053 (Flemming for Congress) (April 26, 2016); Committee 2012 April Quarterly Report at 11; Committee 2012 July Quarterly Report at 11. The total amount of the loans was \$200,700, but the Committee timely repaid a portion of the loans within 60 days by making payments on the outstanding balance. See 11 C.F.R. § 103.3(b)(3).

1 contribution to the Committee.² Pursuant to the Commission's findings, the Office of the
2 General Counsel undertook an investigation to obtain additional information about Spanky,
3 including its tax status, the identity of its members, and how the contribution was attributed
4 among the members.³

5 **III. RESULTS OF INVESTIGATION**

6 The Committee filed a response to the Commission's finding, stating in relevant part that
7 the loans to the Committee were repaid in full, and that Martha Flemming lacked familiarity with
8 FEC regulations and accepted the role as treasurer for the Committee only in an effort to assist
9 her husband's candidacy, and not in a professional capacity.⁴ The Committee has requested that
10 the Commission enter into pre-probable cause conciliation.

11 In its response to the Commission's finding, Spanky confirms that it was organized as a
12 limited liability company in California on February 13, 2012. Spanky provides a copy of its
13 Articles of Organization listing Sherry Hackett as the registered agent.⁵ It states that the
14 organization's purpose is to "engage in any lawful act or activity."⁶ Spanky's 2012 tax return

² See Certification, MUR 7053 (Flemming for Congress) (April 26, 2016). See Factual and Legal Analysis at 5, MUR 7053 (Flemming for Congress) (May 11, 2016).

³ See First Gen. Counsel's Rpt., RR 14L-02 (Flemming for Congress) at 7 (Nov. 26, 2014).

⁴ See Committee Resp. at 1.

⁵ See Resp. of Spanky, LLC (May 25, 2016) ("Spanky Resp. #2"), Attachment 1.

⁶ *Id.* But see Spanky Resp. #2 at 1 (stating that Spanky was "formed for the specific purpose of loaning funds to various real estate and other investments as deemed appropriate by its management").

1 lists Sherry Hackett as the sole member of Spanky and states that Spanky is a disregarded entity.⁷
2 Spanky confirmed that "Spanky LLC is a single member LLC and all tax attributes flow through
3 to [the sole member's] individual tax return. A form 8832 election to be taxed as a corporation
4 was not filed."⁸ Spanky further states that the Committee made representations about Spanky's
5 tax election without consulting with anyone affiliated with Spanky.⁹

6 Spanky argues that the Commission's reason to believe finding "does not take in to
7 consideration the Candidate Guide . . . regarding 'loans,'" which, according to Spanky, permits
8 the March Loan and June Loan as exceptions to the definition of contribution.¹⁰ According to
9 Spanky, the loans qualify as permissible "lines of credit obtained by the candidate" because they
10 meet the normal business practice guidelines at 11 C.F.R. § 100.83.¹¹ Finally, Spanky argues
11 that the fact that the loans were proper under 100.83 moots the issue of the Committee's
12 untimely refunding of an excessive contribution, and that in any event Spanky made efforts to
13 collect the balance due from the Committee and should not be penalized for the Committee's
14 failure to abide by the terms of the loan.¹²

⁷ See *id.*, Attach. 2. The Articles state that Spanky has more than one manager. *Id.*, Attach. 1. David Loftus stated in a phone conversation on July 19, 2016, that although he helps manage the business, Sherry Hackett is Spanky's sole member. Under IRS rules, "[a]n LLC with only one member is treated as an entity disregarded as separate from its owner for income tax purposes (but as a separate entity for purposes of employment tax and certain excise taxes), unless it files Form 8832 and affirmatively elects to be treated as a corporation." See *LLC Filing as a Corporation or Partnership*, at <https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership>.

⁸ Email from David Loftus to Peter Reynolds, August 3, 2016, 3:15 PM.

⁹ Spanky Resp. #2 at 1-2.

¹⁰ *Id.* at 2-3.

¹¹ *Id.*

¹² *Id.* at 3-4.

1 After receiving Spanky's response to the Commission's finding, we added Sherry
2 Hackett as a respondent and notified her in her individual capacity that she may have violated the
3 Act. Hackett did not file a response to the notification.¹³

4 IV. ANALYSIS

5 A contribution is any gift, subscription, *loan*, advance, or deposit of money or anything of
6 value made by any person for the purpose of influencing any election for Federal office.¹⁴

7 A loan is a contribution at the time it is made and is a contribution to the extent it remains
8 unpaid¹⁵ unless it fits within an exception from the definition of contribution.¹⁶ A loan that
9 exceeds the contribution limits of 52 U.S.C. § 30116 and 11 C.F.R. § 110 (\$2,500 at the time
10 Spanky made the loans to the Committee) is unlawful whether or not it is repaid.¹⁷ Contributions
11 which on their face exceed the contribution limitations must be redesignated, reattributed, or

¹³ Spanky filed a third response following Hackett's notification, arguing that the loans were not contributions because they were made in accordance with 11 C.F.R. 100.83 as well as the Commission's *Campaign Guide for Congressional Candidates and Committees*. See Resp. of Spanky (Oct. 26, 2016) ("Spanky Resp. #3"). This response also included a statement by a former consultant to the Committee outlining Spanky's efforts to obtain full repayment of the loans from Flemming. See Statement of Carol Cain at 1-2 (Oct. 26, 2016).

¹⁴ 52 U.S.C. § 30101(8)(A)(i) (emphasis added).

¹⁵ 11 C.F.R. § 100.52(b)(2).

¹⁶ See, e.g., 52 U.S.C. § 30101(8)(B)(vii), 11 C.F.R. § 100.82 (the term "contribution" does not include loans made by a State bank, federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration); 52 U.S.C. § 30101(8)(B)(xiv); 11 C.F.R. § 100.83 (the term "contribution" does not include loans derived from lines of credit available to the candidate). The Commission previously determined that the loans did not fit any of the exceptions to the definition of "contribution" and were therefore excessive contributions. See Factual and Legal Analysis at 4, MUR 7053 (May 11, 2016). In its response to the reason to believe finding, Spanky reiterated its earlier argument that the loans are covered by the exception to the definition of contribution at 11 C.F.R. § 100.83, but presented no new information to support its renewed argument. See Spanky Resp. #2 at 1-3; Spanky Resp. #3 at 1-2.

¹⁷ 11 C.F.R. § 100.52(b)(1).

1 refunded within 60 days of receipt.¹⁸ A contribution from a single-member LLC that does not
2 elect to be treated as a corporation shall be attributed to its sole member.¹⁹

3 The investigation confirmed that Spanky did not elect to be taxed as a corporation in
4 2012, and that Sherry Hackett is its sole member. According to 11 C.F.R. § 110.1(g)(4), "[a]
5 contribution by an LLC with a single natural person member that does not elect to be treated as a
6 corporation . . . shall be attributed only to that single member." Therefore, the loans were
7 contributions that should have been attributed to Sherry Hackett, and not to Spanky LLC.²⁰

8 Under the Act and Commission regulations, Hackett could lawfully contribute \$2,500 to
9 the Committee for the 2012 Primary Election.²¹ Sherry Hackett made a \$1,000 contribution to
10 the Committee on February 15, 2012.²² Therefore, the \$100,700 March Loan exceeded the Act's
11 limit by \$99,200, and all \$100,000 of the June Loan exceeded the Act's limit.²³ Thus it appears

¹⁸ *Id.* § 103.3(b)(3).

¹⁹ *Id.* § 110.1(g)(4).

²⁰ See Factual and Legal Analysis of S. Donald Sussman at 8-9, MUR 6394 (Pingree for Congress) (July 6, 2011). The fact that these contributions were reported by the Committee as having been made by Spanky rather than Hackett raises the issue of whether the loans may have resulted in a contribution in the name of another in violation of 52 U.S.C. § 30122. Although Hackett organized Spanky shortly before making the March Loan, and the available information appears to indicate that Spanky was funded solely by Hackett, there is no indication that Hackett created Spanky or provided funds to Spanky for the specific purpose of making loans to the Committee. Spanky asserts that it was formed for the general purpose of making loans for real estate and other investments, and that the Committee was among a number of entities to which Spanky loaned funds. See Spanky Resp. # 2 at 1. Indeed, Spanky claims to have made several other loans over the course of 2012 to entities that were not candidates or committees. See *id.* at Attach. 8. Furthermore, because the loans to the Committee would have been excessive contributions under either name (Hackett or Spanky), there does not appear to have been an intent to circumvent contribution limitations. Under these factual circumstances, and given the extensive procedural history and the impending statute of limitations, we do not recommend that the Commission pursue a potential violation of 52 U.S.C. § 30122 or any potential violations stemming from the apparent improper attribution of the loans.

²¹ 52 U.S.C. § 30116(a); 11 C.F.R. § 110.1(b).

²² See April 2012 Quarterly Report of the Committee at 6. David Loftus also appears to have made three contributions to the Committee on January 16, February 22, and March 6, 2012, for a total of \$4,000. See *id.* at 7. This amount exceeded the applicable contribution limit during the 2012 election cycle (\$2,500); the available information does not indicate if the excessive amount was redesignated, refunded, or reattributed.

²³ *Id.*

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1 that Hackett made, and the Committee accepted, excessive contributions of \$199,200. The
2 Committee's repayments, however, cured \$50,800 of the June loan by repaying it within 60 days
3 of the date Spanky LLC made the loan to the Committee. Thus, the amount of the excessive
4 contribution was reduced to \$148,400.²⁴

5 Accordingly, we recommend that the Commission find reason to believe Sherry Hackett
6 violated 52 U.S.C. § 30116(a) by making excessive contributions to the Committee in the
7 amount of \$148,400.

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²⁴ The Committee made a \$150,000 payment on July 5, 2012, to repay the March Loan. This payment did not cure the excessive amount, however, because it was not received within 60 days of the receipt of the March Loan. 11 C.F.R. § 103.3(b)(3). The remainder of the July 5 payment (\$50,800), however, was received within 60 days of the June Loan, thus reducing the amount in violation from the June Loan. In its response to the Commission's finding, Spanky disputes the way the Committee reported its July 2012 disbursement of \$150,000 to Spanky, *see* 2012 Pre-Primary Report of the Committee at 16 (showing a payment of \$150,000 on the \$100,700 loan), instead arguing that only \$100,000 (not \$100,700) of the \$150,000 disbursement went toward the March Loan, and thus a balance of \$700 remained on the March Loan. *See* Spanky Resp. #2 at 1, 3. Spanky states that the remaining \$50,000 from the Committee's disbursement was applied to the \$100,000 June Loan, leaving a balance of \$50,000 on the June Loan. *Id.* Spanky states that the combined remaining balance following the July disbursement was thus \$50,700, which was paid in full by the Committee's \$60,000 disbursement to Spanky in August 2013. *Id.* Under their calculation, \$99,200 of the March Loan and \$50,000 of the June Loan would have been excessive and untimely cured, leaving an amount in violation of \$149,200 – slightly larger than the total we get by applying the \$150,000 repayment first to the full balance of the March Loan.


VI. RECOMMENDATIONS

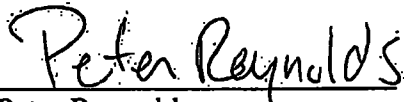
1. Find reason to believe that Sherry Hackett violated 52 U.S.C. § 30116(a) by making excessive contributions to Flemming for Congress and Martha Flemming in her official capacity as treasurer.
2. Approve the attached Factual & Legal Analysis.
3. Enter into conciliation prior to a finding of probable cause to believe with Sherry Hackett and Flemming for Congress and Martha Flemming in her official capacity as treasurer.
4. Approve the attached conciliation agreements.
5. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

1-19-17
Date


Kathleen M. Guith
Associate General Counsel


Peter G. Blumberg
Acting Deputy Associate General Counsel


Peter Reynolds
Attorney

Attachments:

1. Factual and Legal Analysis – Sherry Hackett

1 **FEDERAL ELECTION COMMISSION**
2 **FACTUAL AND LEGAL ANALYSIS**

3
4 RESPONDENT: Sherry Hackett

MUR: 7053

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7 **I. INTRODUCTION**

8 This matter was generated by the Commission's Reports Analysis Division in the normal
9 course of carrying out its supervisory functions and referred to the Office of the General
10 Counsel.¹ The available information shows that Sherry Hackett made excessive contributions
11 totaling \$148,400. Accordingly, the Commission finds reason to believe that Hackett violated 52
12 U.S.C. § 30116(a) and 11 C.F.R. § 110.1(b).

13 **II. BACKGROUND**

14 On April 26, 2016, the Commission found reason to believe that Spanky, LLC, violated
15 52 U.S.C. § 30116(a) and 11 C.F.R. § 110.1(b) by making a \$146,400 excessive contribution to
16 Flemming for Congress and Martha Flemming in her official capacity as treasurer (the
17 "Committee") Committee.² Pursuant to the Commission's findings, the Office of the General
18 Counsel undertook an investigation to obtain additional information about Spanky, including its
19 tax status, the identity of its members, and how the contribution was attributed among the
20 members.³

21 **III. RESULTS OF INVESTIGATION**

22 In its response to the Commission's finding, Spanky confirms that it was organized as a
23 limited liability company in California on February 13, 2012. Spanky provides a copy of its

¹ Reports Analysis Division, Referral of Flemming for Congress, 14L-02 (February 24, 2014) ("RAD Referral").

² See Certification, MUR 7053 (Flemming for Congress) (April 26, 2016). See Factual and Legal Analysis at 5, MUR 7053 (Flemming for Congress) (May 11, 2016).

³ See First Gen, Counsel's Rpt., RR 14L-02 (Flemming for Congress) at 7 (Nov. 26, 2014).

1 Articles of Organization listing Sherry Hackett as the registered agent.⁴ It states that the
2 organization's purpose is to "engage in any lawful act or activity."⁵ Spanky's 2012 tax return
3 lists Sherry Hackett as the sole member of Spanky and states that Spanky is a disregarded entity.⁶
4 Spanky confirmed that "Spanky LLC is a single member LLC and all tax attributes flow through
5 to [the sole member's] individual tax return. A form 8832 election to be taxed as a corporation
6 was not filed."⁷ Spanky further states that the Committee made representations about Spanky's
7 tax election without consulting with anyone affiliated with Spanky.⁸

8 Spanky argues that the Commission's reason to believe finding "does not take in to
9 consideration the Candidate Guide . . . regarding 'loans,'" which, according to Spanky, permits
10 the March Loan and June Loan as exceptions to the definition of contribution.⁹ According to
11 Spanky, the loans qualify as permissible "lines of credit obtained by the candidate" because they
12 meet the normal business practice guidelines at 11 C.F.R. § 100.83.¹⁰ Finally, Spanky argues
13 that the fact that the loans were proper under 100.83 moots the issue of the Committee's
14 untimely refunding of an excessive contribution, and that in any event Spanky made efforts to

⁴ See Resp. of Spanky, LLC (May 25, 2016) ("Spanky Resp. #2"), Attachment 1.

⁵ *Id.* But see Spanky Resp. #2 at 1 (stating that Spanky was "formed for the specific purpose of loaning funds to various real estate and other investments as deemed appropriate by its management").

⁶ See *id.*, Attach. 2. The Articles state that Spanky has more than one manager. *Id.*, Attach. 1. David Loftus stated in a phone conversation on July 19, 2016, that although he helps manage the business, Sherry Hackett is Spanky's sole member. Under IRS rules, "[a]n LLC with only one member is treated as an entity disregarded as separate from its owner for income tax purposes (but as a separate entity for purposes of employment tax and certain excise taxes), unless it files Form 8832 and affirmatively elects to be treated as a corporation." See *LLC Filing as a Corporation or Partnership*, at <https://www.irs.gov/businesses/small-businesses-self-employed/llc-filing-as-a-corporation-or-partnership>.

⁷ Email from David Loftus to Peter Reynolds, August 3, 2016, 3:15 PM.

⁸ Spanky Resp. #2 at 1-2.

⁹ *Id.* at 2-3.

¹⁰ *Id.*

collect the balance due from the Committee and should not be penalized for the Committee's failure to abide by the terms of the loan.¹¹

After receiving Spanky's response to the Commission's finding, we added Sherry Hackett as a respondent and notified her in her individual capacity that she may have violated the Act. Hackett did not file a response to the notification.¹²

IV. ANALYSIS

A contribution is any gift, subscription, *loan*, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.¹³

A loan is a contribution at the time it is made and is a contribution to the extent it remains unpaid¹⁴ unless it fits within an exception from the definition of contribution.¹⁵ A loan that exceeds the contribution limits of 52 U.S.C. § 30116 and 11 C.F.R. § 110 (\$2,500 at the time Spanky made the loans to the Committee) is unlawful whether or not it is repaid.¹⁶ Contributions

¹¹ *Id.* at 3-4.

¹² Spanky filed a third response following Hackett's notification, arguing that the loans were not contributions because they were made in accordance with 11 C.F.R. 100.83 as well as the Commission's *Campaign Guide for Congressional Candidates and Committees*. See Resp. of Spanky (Oct. 26, 2016) ("Spanky Resp. #3"). This response also included a statement by a former consultant to the Committee outlining Spanky's efforts to obtain full repayment of the loans from Flemming. See Statement of Carol Cain at 1-2 (Oct. 26, 2016).

¹³ 52 U.S.C. § 30101(8)(A)(i) (emphasis added).

¹⁴ 11 C.F.R. § 100.52(b)(2).

¹⁵ See, e.g., 52 U.S.C. § 30101(8)(B)(vii), 11 C.F.R. § 100.82 (the term "contribution" does not include loans made by a State bank, federally chartered depository institution, or a depository institution the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration); 52 U.S.C. § 30101(8)(B)(xiv); 11 C.F.R. § 100.83 (the term "contribution" does not include loans derived from lines of credit available to the candidate). The Commission previously determined that the loans did not fit any of the exceptions to the definition of "contribution" and were therefore excessive contributions. See Factual and Legal Analysis at 4, MUR 7053 (May 11, 2016). In its response to the reason to believe finding, Spanky reiterated its earlier argument that the loans are covered by the exception to the definition of contribution at 11 C.F.R. § 100.83, but presented no new information to support its renewed argument. See Spanky Resp. #2 at 1-3; Spanky Resp. #3 at 1-2.

¹⁶ 11 C.F.R. § 100.52(b)(1).

1 which on their face exceed the contribution limitations must be redesignated, reattributed, or
2 refunded within 60 days of receipt.¹⁷ A contribution from a single-member LLC that does not
3 elect to be treated as a corporation shall be attributed to its sole member.¹⁸

4 The investigation confirmed that Spanky did not elect to be taxed as a corporation in
5 2012, and that Sherry Hackett is its sole member. According to 11 C.F.R. § 110.1(g)(4), “[a]
6 contribution by an LLC with a single natural person member that does not elect to be treated as a
7 corporation . . . shall be attributed only to that single member.” Therefore, the loans were
8 contributions that should have been attributed to Sherry Hackett, and not to Spanky LLC.¹⁹

9 Under the Act and Commission regulations, Hackett could lawfully contribute \$2,500 to
10 the Committee for the 2012 Primary Election.²⁰ Sherry Hackett made a \$1,000 contribution to
11 the Committee on February 15, 2012.²¹ Therefore, the \$100,700 March Loan exceeded the Act’s
12 limit by \$99,200, and all \$100,000 of the June Loan exceeded the Act’s limit.²² Thus it appears
13 that Hackett made, and the Committee accepted, excessive contributions of \$199,200. The
14 Committee’s repayments, however, cured \$50,800 of the June loan by repaying it within 60 days
15 of the date Spanky LLC made the loan to the Committee. Thus, the amount of the excessive
16 contribution was reduced to \$148,400.

¹⁷ *Id.* § 103.3(b)(3).

¹⁸ *Id.* § 110.1(g)(4).

¹⁹ See Factual and Legal Analysis of S. Donald Sussman at 8-9, MUR 6394 (Pingree for Congress) (July 6, 2011).

²⁰ 52 U.S.C. § 30116(a); 11 C.F.R. § 110.1(b).

²¹ See April 2012 Quarterly Report of the Committee at 6. David Loftus also appears to have made three contributions to the Committee on January 16, February 22, and March 6, 2012, for a total of \$4,000. See *id.* at 7. This amount exceeded the applicable contribution limit during the 2012 election cycle (\$2,500); the available information does not indicate if the excessive amount was redesignated, refunded, or reattributed.

²² *Id.*

- 1 Accordingly, the Commission finds reason to believe Sherry Hackett violated 52 U.S.C.
- 2 § 30116(a) by making excessive contributions to the Committee in the amount of \$148,400.